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No. 73-1314

# In the Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM GREEN CONSTRUCTION CO., INC. AND UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONERS

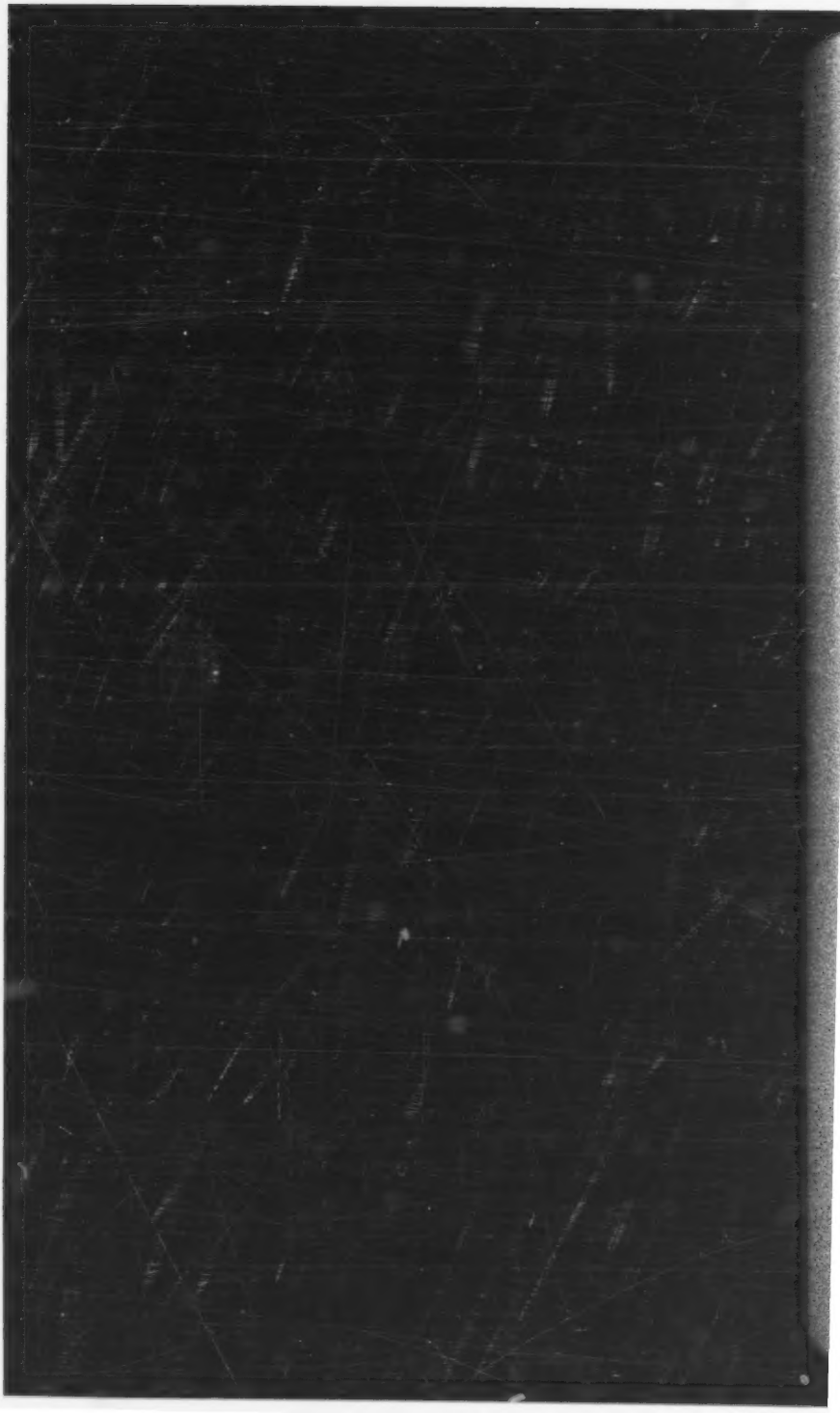
v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*



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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The government, on January 26, 1974, filed a petition for a writ of certiorari (No. 73-1153) to review the judgment of the Court of Claims in this case. The respondents, William Green Co. and United States Fidelity and Guaranty Company, its surety, (collectively referred to as "Green") filed a cross-petition for a writ of certiorari stating that the cross-petition is "conditional" upon the granting of the government's petition for certiorari (Cr. Pet. 1).[1] This memorandum is filed in opposition to Green's petition.

The relevant facts are stated at pp. 2-9 of the government's petition for a writ of certiorari in No. 73-1153.

[1] "Cr. Pet." designates the cross-petition.

1. Green contends that the government was estopped, in the Court of Claims, from seeking dismissal of Green's damage claim for losses on the FOB and Training School contracts. The estoppel arises, Green maintains, because the government acted inconsistently in moving to dismiss Green's petition in the Court of Claims for Green's failure to exhaust its administrative remedies, when the government itself had obtained a previous dismissal of Green's administrative claims (Cr. Pet. 13-14).

Green's allegation that the government acted inconsistently is without merit. Green's administrative claim challenged the termination of a different contract—the Howard agreement. By its Amended Notice of Appeal under the Howard contract, filed with the General Services Board of Contract Appeals ("the Board") on July 27, 1966, Green alleged, *inter alia* (p. 21):

> It is the position of the contractor that the Government, among other things, has wrongfully terminated the contract and, as a consequence thereof, the contractor has suffered consequential damages extending beyond the contract. The Board, however, does not have jurisdiction to decide issues of breach of contract and award damages therefor.

Although Green now contends that this claim for consequential damages included claims arising out of the FOB and Training School contracts, there is no reference to either of these contracts in the Amended Notice of Appeal.[2] Green acknowledged in its Amended Notice of

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[2]Likewise, the January 31, 1968, letter from Green to the Board referred to in the Board's opinion, in which Green stated that part of the damages Green was seeking were for breach of contract, contained no reference to either the FOB or the Training School contracts. *Appeal of William Green Construction Co.*, 68-1 BCA Para. 6883, at p. 31,797.

Appeal (*supra*) that the Board in the Howard appeal was limited to the remedies provided in the Howard contract (costs incurred on the Howard project plus a measure of profits on work performed, but not unearned profits) and that the Board could not entertain claims for breach of contract.[3] Moreover, even if Green had directly challenged the default terminations of the FOB and Training School contracts in its Amended Notice of Appeal, a motion to dismiss such claims as untimely would have been appropriate because Green's Amended Notice of Appeal was not received by the Board until after the expiration of the 30-day period within which an administrative appeal may be filed.[4] The Board therefore properly dismissed the breach of contract claims on the government's motion.

Accordingly, there was nothing inconsistent in the government's subsequent motion in the Court of Claims to dismiss Green's claims for breach of the FOB and Training School contracts. Green's remedies, if any, were available administratively pursuant to the provisions of the contracts, but only in the event Green had advanced its claims in a timely manner. This it did in the case of the Howard default termination; however, with respect to the FOB and Training School contracts, no administrative appeals were ever timely

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[3]It is clear that the standard disputes clause contained in the Howard contract does not vest a Board of Contract Appeals with jurisidction to hear and decide breach of contract claims not redressable under other specific contract provisions. *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394 .

[4]Green's Amended Notice of Appeal was dated July 26, 1966, and was received by the Board on July 27, 1966, more than 30 days after the receipt by Green of both the May 23, 1966, default notice on the FOB contract and the June 9, 1966, default notice on the Training School contract.

filed. Therefore, the government was not precluded from asserting before the Court of Claims that Green's claims on the FOB and Training School contracts were barred due to Green's failure to exhaust the available adminstrative remedies. Indeed, one of the principal grounds upon which the government has sought certiorari is that the Court of Claims allowed Green to seek an administrative remedy when the time for such an appeal has long since expired.

2. There is also no merit to Green's contention that the administrative remedy is inadequate. The crux of Green's argument is that a government contractor who has been wrongfully unpaid must nonetheless complete the project in order to obtain his administrative remedy (Cr. Pet. 14). This assertion is incorrect. As the court below noted, Green could have discontinued the project, and upon the formal entry of a default termination, Green "could have attacked the termination, through an appeal to the GSBCA * * *" (Cr. Pet. App. 23a). In the event Green had prevailed in those proceedings, it would have recovered "costs incurred plus a measure of profit, but not unearned profits * * *" (Cr. Pet. App. 23a). There was, therefore, an ample and expeditious administrative remedy available to Green, which it unjustifiably failed to pursue. Nor is there any merit to Green's assertion (Cr. Pet. 16) that the alleged refusal by the government to make further progress payments constituted an 'anticipatory breach' of the contract which would give Green a right to sue in the Court of Claims. As the Court of Claims noted, this "current stance is conclusively refuted by the significant fact that [the surety (one of the petitioners herein)] * * * undertook to complete the FOB project after termination" and "the existence of the contract was the essential predicate for the surety's

agreement to complete" (Cr. Pet. App. 24a).[5] As we noted above, Green had the right under the contract to an administrative remedy for the losses it sustained as a result of the government's allegedly improper action, and it was obliged to pursue that remedy. See, *United States* v. *Anthony Grace & Sons,* 384 U.S. 424; *United States* v. *Holpuch Co.,* 328 U.S. 234.[6]

3. Nor is the administrative remedy, in the form of a convenience termination, inadequate because it will not afford Green recovery of its unearned profits and

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[5]The surety on the Training School contract also assumed the responsibility for the completion of that contract. It should be noted that a default termination does not constitute a termination of the contract, but merely terminates the contractor's right to continue performing the contract. Thus, in instances where a contract has been default terminated, claims by the government for excess reprocurement costs are considered to be claims "under the contract" and thus subject to a contracting officer's final decision which may be appealed to a contract appeals board. *E.g., Astro-Space Laboratories, Inc.* v. *United States,* 470 F. 2d 1003(Ct. Cl.)

[6]The decision of the Court of Claims in *National Factors, Inc.* v. *United States,* No. 93-63, decided March 20, 1974 (Supplementary Brief of Petitioner in No. 73-1314 and Respondent in No. 73-1153) is not a new matter intervening since Green's last filing. On March 19, 1971, the Court of Claims held that National Factors' allegations of bad faith were sufficient to sustain the petition against a motion for summary judgment. The March 20, 1974, decision is simply a ruling on the admissibility of evidence with respect to a petition already held sufficient. While we believe that the position of the Court of Claims in *National Factors* is erroneous, we also believe the case is distinguishable. There the principal issue is whether bad faith can convert a convenience termination into a breach of contract. Here, where the default termination was requested by Green, there can be no suggestion that the default termination itself was in bad faith. Moreover there is no allegation that the government's refusal to waive its right to set-off (which allegedly caused Green to abandon its projects) was made in bad faith.

damages for the loss of its entire business. As the Court of Claims stated:

> "The only substantial difference between the sum calculated under" equitable adjustment or convenience-termination standards "and the amount recoverable in a common law action for contract breach is the non-inclusion in the former of anticipated but unearned profits." *Nolan Bros., Inc.* v. *United States, supra,* 186 Ct. Cl. at 607, 405 F. 2d at 1253. This exclusion from relief of unearned profits is a settled policy which has long been accepted and enforced. 186 Ct. Cl. at 608-09, 405 F. 2d at 1254-55; *General Builders Supply Co.* v. *United States, supra,* 187 Ct. Cl. at 485-86, 409 F. 2d at 251; *G.C. Casebolt Co.* v. *United States, supra,* 190 Ct. Cl. at 788, 421 F. 2d at 713. And even in a common law-suit there would be no recovery for general loss of business, the claimed loss of the entire Green net worth, and losses on the non-federal work—such damages are all deemed too remote and consequential. See *Ramsey* v. *United States,* 121 Ct. Cl. 426, 433-35, 101 F. Supp. 357-58 (1951), *cert. denied,* 343 U.S. 977 (1952); *Dale Constr. Co.* v. *United States,* 168 Ct. Cl. 692, 738 (1964); *Specialty Assembly & Packing Co.* v. *United States,* 174 Ct. Cl. 153, 175, 355 F. 2d 554, 567-68 (1966). The conclusion must be that the administrative remedy is, as we have already said, a full and permissible substitute for the award of damages under the former "breach" claim. [Cr. Pet. App. 25a-26.]

Moreover, Green bases its alleged entitlement to these damages on the fact that, at the time the government's procurement officials took their allegedly wrongful action against Green (advising it that the right to set-

off would not be waived), Green had informed the government's officials of the far-reaching consequences of their decision (Cr. Pet. 17-18). However, the only recoverable damages are those that are foreseeable at the time of the making of the contract, not those which may become foreseeable at the time of the alleged breach. *Globe Refining Co.* v. *Landa Cotton Oil Co.*, 190 U.S. 540, 544; *Hadley* v. *Baxendale*, 9 Exch. 341 (1854); A.L.I., *Restatement of the Law of Contracts*, §§ 330-331 (1932); 11 *Williston On Contracts*, §§ 1356-1357 (3d ed. 1968).

It is therefore respectfully submitted that the cross-petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

MAY 1974.